MALAYSIAN REPORTS

CHOW YEW HON & ORS. v. OON KIM MENG

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) March 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 36 of 1974]

Mining — Mining sub-lease — Application for cancellation — Allegation of transfer or assignment of lease without authority — Failure to work mine — Onus of proof — Evidence Act, 1950, ss. 101 and 102 — Mining Enactment (F.M.S. Cap. 147), ss. 11, 16.

The respondent brought an action for the cancellation of a mining sub-lease issued to Chow Ying and Tang Chow as joint sub-lessees. It was alleged that the sub-lessees had transferred or assigned the sub-lease without authority and that the sub-lessees had not worked or mined the mining land for a period of over one year. In the High Court judgment was given for the respondent and the appellants appealed.

Held, allowing the appeal: (1) the respondent had not satisfied the onus on him to prove a transfer on assignment as alleged in his statement of claim and the learned judge was in error in holding that the appellants had been in breach of the condition in the sub-lease;

(2) in this case it would appear that the reason the land could not be worked was for lack of a dumping area, which was not available until the adjoining lot had been mined. In the circumstances it would appear unduly harsh to enforce cancellation for what was at best a technical breach.

FEDERAL COURT.

Y. M. Chin for the appellants.

Kwok Yoke How for the respondent.

Ong Hock Sim F.J.: The appellants are the Administrators and Administratrix of the Estate of Chow Ying @ Chow Ying Kee (deceased) and Tang Chow @ Tang Chow Wing, the joint Sub-Lessees of the land held under Mining Certificate No. 1578 for Lot No. 2411 in the Mukim of Batu in the District of Kuala Lumpur containing an area of 16.644 acres of the respondent. They appeal from a judgment of the High Court at Kuala Lumpur in Civil Suit No. 969 of 1972 instituted by the respondent against the deceased and the second appellant for cancellation of the Mining Sub-Lease dated April 12, 1971 and consequential reliefs on the grounds set out in paragraphs 4 and 5 of the statement of claim, namely: —

"4. The sub-lessees have transferred or assigned the said sub-lease to third parties which transfer or assignment is expressly forbidden under Clause 7 of the annexure to the said sub-lease unless the written authority of the sub-lessor is first obtained. The plaintiff has not at any time been approached by the defendants for such authority to transfer or assign the said sub-lease and no such authority whether written or oral has been given by the plaintiff.

5. Further the defendants have not worked or mined the said mining land for a period of over one year and have therefore failed to comply with Clauses 4 and 9 of the annexure to the said sub-lease and also the provisions of the Mining Enactment Cap. 147 and in particular section 16 thereof."

by reason whereof:

"6. ... the defendants have rendered the land liable to forfeiture under the Mining Enactment Cap. 147 thereby rendering the said sub-lease liable to cancellation under Clause 8 of the annexure to the said sub-lease."

On October 19, 1972, the date of filing the said Civil Suit, the said Chow Ying @ Chow Ying Kee was dead, having died on October 18, 1971. In accordance with section 40(ii) of the Mining Enactment, his personal representatives appeared to defend the suit (per grant of Letters of Administration given on February 4, 1974), initial objections as to the validity of the writ as at date of issue on ground of first defendant's earlier demise having apparently been withdrawn or waived.

The defence of both the appellants can be summarised as follows: —

(i) The terms of the sub-lease regarding commencement of mining operations have been waived and/or varied by the conduct of the respondent.

(ii) The appellants admit jointly working the said land with others but deny having transferred or assigned the sub-lease.

(iii) Alternatively, if it was held that there was a transfer or assignment thereof, the respondent had notice and, having failed to object, should be deemed to have acquiesced and waived clause 7 of the Annexure.

(iv) The appellants also plead that their failure to commence mining within the one year from date of the sub-lease was due to circumstances beyond their control and not due to any wanton failure on their part to do so.

(v) Lastly, they say it was not a proper case for cancellation of the sub-lease and the respondent had suffered no, or any such, loss or injury, arising out of the failure to commence mining operations within one year, which cannot be compensated in money without the grant of an injunction.

The appellants also counterclaimed, in the event cancellation is decreed, for compensation under section 37 of the Specific Relief (Malay States) Ordinance, 1950.

In his reply, the respondent denied receiving notice from either appellant of the working of the said land in partnership with others or having acquiesced in the partnership arrangements. He maintained his right to enforce clause 7 of the Annexure and further that the particulars given for failure to work the said land within the period of one year, *even if true, was no answer* in law to his claim as the appellants could have applied to aggregate Lots 2410 and 2411 under the provisions of the Mining Enactment (which was equally no answer — see section 20).

Paragraph 4 of the statement of claim made a specific allegation that *"the sub-lessees have transferred or assigned the said sub-lease to third parties"* in breach of clause 7 without the written authority of the respondent. It should be noted that the third parties were not named. At the hearing the respondent gave no evidence to substantiate his allegation but referred briefly to two letters at pages 59 AB and 71 AB under the letter-heads of Jinjang Thong Fatt Tin Mine, to both of which he did not reply. He had also no knowledge whether the appellants were connected with the said Jinjang Thong Fatt Tin Mine but requested his solicitors to make a search with regard thereto. The respondent did not deign to enlighten the court what the search revealed. Perhaps in law, I should draw an adverse inference, but I am not doing so. It seems to me that the respondent was unaware of section 101

of the Evidence Act (No. 56 of 1950 — Revised 1971) which enacts: —

"101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist."

as well as section 102 providing that: —

"102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In his judgment, the learned judge, in referring to clause 7 of the terms and conditions of the sub-lease, made a slight error which I mention only for clarification. This is apparent from reading clause 6 of the draft sub-lease at page 6 AB which is set out hereunder: —

"6. That the sub-lessees shall not be entitled to grant a sub-sublease of the lands herein comprised without the previous written authority of the sub-lessor."

and clause 7 at page 48 AB now reproduced: —

"7. That the sub-lessees shall not be entitled to transfer or assign this sub-lease without the written authority of the sub-lessor."

On this issue, he went on to say: —

"On the evidence before me I am satisfied that the plaintiff has established that the defendants did assign the sub-lease to the company. This was effected by way of a permit to mine granted to Chew Yew Nan @ Chow Yew Nam and How Heng Huat as trustees of the company. The terms and conditions under which the permit was granted are similar to those in the sub-lease. In my view, the permit given to the company by the defendants was in effect a sub-lease."

"... To determine whether there was an assignment the court has to construe the terms under which the permit was granted. I find that during the currency of the permit the defendants were completely divested of their interest. Although the permit was granted for an initial period of one year the company had the option to renew etc. The permit was granted for a consideration.... For these reasons I do not see how the defendants could argue that there was no assignment of the sub-lease."

Yet in dealing with the appellants' contention that their arrangements for working the land were known to, and acquiesced in by, the respondent, he said: —

"In support ... the defendants seek to rely on two letters written to the plaintiff with letterheads 'Jinjang Thong Fatt Tin Mining Company.' *It is my finding that neither* of these letters *revealed* any arrangement the defendants had with the company or *an indication that the company was given a permit to mine the sub-leased land.*"

The respondent's counsel agreed in his written submission when he said: —

"With respect, *there is in fact nothing* in the contents of these two letters *which reveal any assignment or transfer of the sub-lease.*"

I have already referred to the gist of the respondent's evidence earlier and it is clear that the judge's conclusions were not based on that evidence but *rested entirely on that permit, and that permit alone.* That permit is at pages 53-54 AB, purportedly granted by the deceased and second appellant to the persons named therein "as trustees for Jinjang Thong Fatt Tin Mining Company" and is dated July 13, 1971. It is not in dispute that, after approval of a mining scheme dated April 3, 1971 submitted by the appellants by the Mines Department by letter dated April 7, 1971 (see pages 38 AB and 42 AB), the sub-lease in question was executed on April 12, 1971 (see pages 44 AB-49 AB). It is also not in dispute that approval for dumping on Lot 4634 granted by letter dated July 14, 1971 (see page 55 AB) was subsequently withdrawn by the Land Office in August 1971 (presumably page 56 AB) owing to a proposal to use that lot in connection with a housing development scheme. Whether that put paid to the July permit to mine is not in evidence, but it is not on record that the option to renew had ever been exercised or that at the material time it was still valid. It is on record however that at the material time a second permit to mine had been granted after the death of the first appellant sub-lessee to the second appellant himself for a period of one year from December 10, 1971 (see page 66 AB). This apparently followed the approval of a second mining scheme on October 26, 1971 (see page 88 AB). Not one word was said about this second permit nor was its significance and possible impact upon the earlier permit in the minds of the judge or counsel for the parties. In my view, it must show the judge's inferences on the issue of assignment to be, to put it mildly, tenuous. It must mean that the respondent had not satisfied the onus on him to prove a transfer or assignment as alleged in his statement of claim. I would therefore hold that the learned judge was in error in finding the appellants in breach of clause 7 of the Annexure.

I would deal with the next ground upon which the learned judge gave judgment in favour of the respondent, namely, that the appellants had failed to work the mine within a period of one year as required by clauses 4 and 9 of the Annexure (see paragraph 5 of the Statement of Claim). The judge also mentioned clause 8(b) of the Annexure, which is section 97(ii)(b) of the Mining Enactment but with the insertion of the additional words "or the court" and I now reproduce: —

"8. That this sub-lease shall be liable to cancellation at any time at the discretion of the Senior Inspector of Mines or the court upon proof —

(b) That the sub-lessees have not worked the lands in accordance with clause 4 of the sub-lease or have by their default rendered the lands liable to forfeiture under the Mining Enactment;"

On this question, the learned judge said: —

"On the evidence before me I also find that the defendants had committed a breach of clause 9 of the sub-lease. The second mining scheme was approved on October 26, 1971. The defendants were therefore required to commence mining operations on Lot 2411 on or before April 25, 1971? (1972). This they failed to do. The defendants' contention that the delay was due to circumstances beyond their control cannot be sustained for the simple reason that they clearly omitted to put up a mining scheme that would enable them to commence mining operations on Lot 2411 within the time stipulated under the sub-lease. Such a scheme was possible...."

"In the present case the defendants knew full well that they had to commence actual work on the said mining land six months after a mining scheme was approved. The defendants ought therefore to have taken this into account when submitting a new mining scheme for approval. The defendants clearly could have put up a mining scheme under which mining operations could commence on Lot 2411. They did not put up such a scheme because it was obviously not convenient to them ... the defendants' scheme to work first on Lot 2410 was essentially to suit their own purpose."

Before I deal with my reasons for respectfully disagreeing again with the learned judge, I would like to say a few words of the relationship between the parties as I have been able to glean from the docu-

mentary evidence in part II of the record and the pleadings. The parties had had dealings with respect to this piece of land as far back as November 19, 1956 (see Agreement at page 5 AB with the terms and conditions of a proposed sub-lease to be entered into pursuant thereto at pages 6-8 AB). Clauses 1 and 2, I propose to set out hereunder: —

"1. In the consideration of the sum of $500/- (Dollars Five hundred only) now paid by the Miners to the Owner, the receipt whereof the Owner hereby acknowledges, and in consideration of the sum of $2,534.50 (Dollars Two thousand five hundred and thirty-four and cents fifty only) being conversion fee paid by the Miners on behalf of the Owner in respect of the conversion of the said lands into mining lands, the Owner hereby agrees and undertakes to permit the Miners to work and mine the said lands and to grant to the Miners a valid and registrable sub-lease in respect thereof in terms of the copy of the proposed sub-lease hereto attached and marked 'A'.

2 The Miners shall within six (6) months from the date hereof commence works and operations on the said lands but *if* any delay in commencing mining is *due to Government's part this Clause shall not apply.*"

Subsequent thereto, it appeared fresh agreements were entered into and the *bona fides* of the respondent would appear, to say the least, suspect, as evidenced by letter of December 1, 1971 (see pages 60-62 AB), relevant portions of which are now reproduced: —

"Jinjang Thong Fatt Tin Mining Co.

Re: (1) Perakuan Lombong No. 1578 (old EMRs. 2368 and 2367?) not 2369 (see pp. 55 AB and 56AB) for lots 419 and 418 Mukim of Batu. (2) Perakuan Lombong No. 1584 for lot 2410 (old EMRs. 6082, 4861 and 4862 for lots 417, 416 and 415) Mukim of Batu.

We now write to advise that in 1964 Chow Ying and Tang Chow entered into two separate agreements with Oon Chooi Guan and Oon Kim Meng respectively for the conversion of their lands then held under the above EMRs. into mining land. Oon Chooi Guan died on the 10th January, 1960 and Letters of Administration to his estate were granted to his widow, Madam Tan Choi. The respective EMRs. abovementioned are to be converted for mining by Chow Ying and Tang Chow.

Both the said Tan Choi (f) and Oon Kim Meng subsequently repudiated the said two agreements and accordingly Chow Ying and Tang Chow commenced two separate actions against them respectively being K.L. High Court Civil Suits Nos. 1212/64 and 1213/64. Both these said actions involving the said EMRs. were settled upon terms that those EMRs. were to be surrendered in exchange for mining title and the execution of sub-leases thereover in favour of Chow Ying @ Chow Ying Kee and Tang Chow @ Tang Chow Wing.... Oon Kim Meng, the lessee of Perakuan Lombong No. (1) above has executed the sub-lease in favour of Chow Ying @ Chow Ying Kee and Tang Chow @ Tang Chow Wing and the sub-lease has been duly registered.

The said Chow Ying @ Chow Ying Kee and Tang Chow @ Tang Chow Wing throughout acted as trustees for Jinjang Thong Fatt Tin Mining Co. But for the fact that the former had died, the sub-lease would have been executed in their favour.

In view of what have happened, we trust you will exercise your discretion to ... issue the hydraulic licence in the name of Tang Chow @ Tang Chow Wing alone.

We trust that you will issue the hydraulic licence expeditiously so that our client may not be charged with breaches of the terms of the sub-leases, i.e. failing to work the lands within the time stipulated therein."

I have adverted to this background of the relationships between the parties as I consider it essential to a proper assessment and appreciation of the evidence adduced. I now quote section 16 of the Mining Enactment: —

"16. There shall be implied in every mining lease, other than a mining lease expressed to be for working mineral oil and oil shales only, *in the absence of any express condition to the contrary* the following covenants and conditions on the part of the lessee:

x x x

(iii) (a) That the lessee will commence mining operations upon the land within a period of one year from the date of issue of the mining lease;"

Section 16(iii)(a) is an implied covenant in a Mining Lease. Until the land is properly surveyed, a Mining Certificate is issued instead (see section 11(viii)) but section 11(vii) provides: —

"(vii). Every such mining certificate shall, so far as circumstances permit, confer the same rights and privileges and be subject to the same covenants, conditions, ... of this Enactment as a mining lease for the same purposes under this Enactment."

But the respondent's Mining Certificate No. 1578 (see pages 35 AB-37 AB) "*is issued subject to Agreement No. 5/71* made between Oon Kim Meng and the Government of the State of Selangor on the 11th day of November, 1970, which said agreement *shall run with the land and shall bind the lessee and the sub-lessee for* the time being." That Agreement is in the possession of the respondent but he has chosen not to produce it so that it could be seen to what extent, if any, those express terms have modified or otherwise excluded the provisions in the Mining Enactment. Assuming that there was a breach of section 16(iii)(a), cancellation of the sub-lease under section 97(ii)(b) is in the discretion of the Warden. As the Mines Department wrote at page 88 AB: —

"2. Chow Ying and Tang Chow first made an application to the Mines Department on 3.4.71 to mine MC.1578 for Lot 2411, Mukim of Batu. This mining scheme was approved in principle on 7.4.71. A plan showing the approved mining scheme is attached. *The miners were forced to abandon this scheme because the dumping area* on State Land Lot 4634 *originally approved for dumping* by the Land Office, Kuala Lumpur, *was subsequently withdrawn.*"

It was upon the approval of the scheme that the appellants took a sub-lease on April 12, 1971. As Defence Witness No. 1, Phun Kong Tet said: —

"Lot 4634 had been utilised for dumping.

Lot 4634 was an old mining land.

Lot 2411: This lot to be worked with palong on it *could not be approved because of lack of dumping area.*

Lot 2410 was under a mining title.

The palong is located on Lot 2410. *The palong could be sited on Lot 2411* and the work could also be carried out on Lot 2411 *provided the dumping is done on Lot 2410.... In this case,* the mine is mined by palong and *dumping cannot be done on the same land.*"

and in answer to the court: —

"Looking at page 88B AB, *I confirm* that the scheme could remain as it is except *that the dumping cannot be done on Lot 2410.*"

It is apparent that Lot 2411 could not be worked until Lot 2410 had been mined, for it would not be working in an orderly skilful and workmanlike manner to use good land for dumping and it would be in breach of the sub-lease of Lot 2410. In those circumstances, it would appear unduly harsh to enforce cancellation for what is at best a technical breach.

The appellants pleaded their failure to commence within the year was due to circumstances beyond their control and not to any wanton failure on their part, these being —

"(a) the directions of the Pemungut Hasil Tanah, Kuala Lumpur in refusing to allow the use of State Land Lot 4634 (which was originally approved by the Merinyu Galian, Kuala Lumpur as a dumping area for the proposed mine and thereby rendering such approved scheme incapable of being carried into effect);

(b) stipulation in the Hydraulic Licence issued by the appropriate authority the first defendants were to work initially on Lot 2410 adjacent to the land under the said sublease which said Lot 2410 would have to be used as a tailing dumping area. Pursuant thereto mining operation has had to be commenced on Lot 2410 first and working towards Lot 2411; and in the premises the first defendants aver that they and the second defendant were frustrated by the intervening events enumerated above from commencing mining operations within the 12 months' period;"

The respondent had not challenged these facts, but contended that he was still entitled to his claim because the appellants could have applied immediately to aggregate the two mining lands under the provisions of the Mining Enactment. It seems to me that this is a red herring for the reason Lot 2411 cannot be worked was for lack of a dumping area, which was not available until Lot 2410 had been mined.

I do not propose to say more on this as the learned judge apparently considered only clause 9 of the Annexure as the passages quoted from his judgment bear out. As it was conceded by the appellants' Counsel that Lot 2411 was worked only from October 16, 1972, the judge was satisfied that this was some six months out of time stipulated in clause 9. The provisions of clause 8 of the Annexure relating to cancellation while specifying a breach of clause 7 as one of the four grounds did not include clause 9 as one of them. *Expressio unius est exclusio alterius.* Should a power to impose such a strict penalty as cancellation be inferred in the absence of express words? Assuming however that such a power can be inferred, is it mandatory or discretionary? Following section 97(ii), cancellation must be in the discretion of the court. The judge was of the view the appellants had to accept the responsibility for non-compliance with clause 9 because they *could have put up a scheme* which would enable them to commence mining operations on Lot 2411 within the time stipulated under the sub-lease and they *ought to have taken clause 9 into account* when putting up a new mining scheme for approval. He had given undue weight to the evidence of PW2, Dinyati bin Tirman, who was asked: "Could the defendants submit a mining scheme siting the palong and working area on Lot 2411 instead of Lot 2410?" and answered: "It is possible." As he (the judge) said he rejected the appellants' contention that the delay was due to circumstances beyond their control *"for the simple reason that they had clearly omitted to put up mining scheme that would enable them to commence mining operations on Lot 2411 within the time stipulated under the sub-lease. Such a scheme was possible."* No elaboration was sought of the witness Dinyati concerning the feasibility of that scheme but the witness Phun said that to site the palong on Lot 2411 the work could only be carried out provided the dumping is done on Lot 2410. Would it be good mining practice to utilise good mining land for dumping? Lot 2410 was under Mining Title. I therefore respectfully disagree with the learned judge's finding that clause 9 had been breached. The scheme approved on October 26, 1971 itself provided that work should commence on Lot 2410 and move towards Lot 2411. It is therefore clear that such breach would only occur if there was undue delay in doing so. In any event, it is my view that *cancellation for breach of clause 9 is not empowered by clause 8 of the Annexure.*

I would therefore set aside the judgment of the learned judge ordering cancellation of the sub-lease of 12th day of April, 1971 and delivery of possession of the land, also that part of the judgment restraining the Appellants and their servants or agents from mining the said Mining Land and for payment of the sum of $6,539.58 by way of damages. As the appellants have succeeded on their appeal, it would not be necessary to deal with the counter-claim. The respondent will pay the costs of the appellants, both here and in the court below.

Gill C.J. and **Ali F.J.** concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; Skrine & Co.*

H.M.T. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 54 of 1974]

Income Tax — Payment of gratuity on retirement — Taxpayer employed on short term contracts — Termination in accordance with provisions of contract — Whether compensation for loss of employment — Income Tax Ordinance, 1947.

The appellant had been employed by a company on short term contracts, the first for a term of four years, and then subsequently for two further terms of three years each. On completing the service under the third contract, the appellant left for Denmark on five months' leave with a return ticket for himself and his family and leaving much of his belongings in Malaysia. While still on leave he was informed by his employers that they were terminating his contract of service. He was given the requisite notice of termination in accordance with the provisions of the contract. He was then 34 years old and had worked for the company for a continuous period of just over 10 years. The company paid him his salary and allowances and also a sum of $74,954.32 as gratuity on retirement. He was assessed to tax on this sum and on appeal to the Special Commissioners, it was held that the sum was granted to the appellant in respect of his employment with the company and was therefore a gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance, 1947. An appeal to the High Court was dismissed ([1974] M.L.J. 211) and the appellant appealed to the Federal Court.

Held, allowing the appeal: the appellant in this case had a real prospect of continued employment from contract to contract and therefore the payment to him was compensation for loss of employment and not taxable, under the Income Tax Ordinance, 1947.

Cases referred to:-

(1) *Comptroller-General of Inland Revenue* v. *T.* (*Knight's* case) [1972] 2 M.L.J. 73.

(2) *Beynon* v. *Thorpe* 14 T.C. 1, 14.

(3) *H.* v. *Comptroller-General of Inland Revenue* (*Heywood's* case) F.C. [1973] 2 M.L.J. 43.